

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	No. 83-314-1
v.	:	
	:	(CIVIL ACTION
GEORGE MARTORANO	:	No. 00-3040)

MEMORANDUM AND ORDER

HUTTON, J.

December 11, 2001

Currently before the Court is the Petitioner George Martorano's Request for Reconsideration of a Portion of the August 8, 2001 Order (Docket No. 206), and the Government's Memorandum in Opposition to the Petitioner's Reconsideration of a Portion of the August 8, 2001 Order (Docket No. 207). For the reasons outlined below, Petitioner's Motion is **DENIED**.

I. BACKGROUND

On June 4, 1984, Petitioner George Martorano ("Petitioner") pled guilty to charges that he had been a wholesale distributor of large amounts of cocaine, methamphetamine, methaqualone, and marijuana. On September 20, 1984, the Petitioner was sentenced to life imprisonment without the possibility of parole. Petitioner appealed his sentence to the United States Court of Appeals for the Third Circuit. The Third Circuit found that the district court had failed to comply with certain requirements of Federal Rule of

Criminal Procedure 32 at the sentencing hearing and the Petitioner's sentence was vacated.

On November 6, 1987, a new sentencing hearing was held. The Petitioner was again sentenced to life imprisonment without the possibility of parole. Because the defense contended that the Petitioner was mentally ill and of subnormal intelligence, the sentencing court ordered that a mental evaluation of the Petitioner be performed. After the sentencing court determined that the Petitioner did not suffer from a mental deficiency or mental illness, an additional sentencing hearing was held.

On April 26, 1988, the Petitioner's final sentencing hearing was held. During that hearing, the subject of the Petitioner's lack of cooperation with the authorities became an issue. After his plea of guilty, the Petitioner offered no cooperation or assistance to the Government regarding information he might have concerning ongoing criminal activity. The sentencing judge "specifically relied on his absence of cooperation in imposing the sentence he did at resentencing." United States v. Martorano, 866 F.2d 62, 71 (3d Cir. 1989). The court sentenced prisoner, yet again, to life imprisonment without the possibility of parole.

The Petitioner appealed his sentence and on January 11, 1989, the Third Circuit denied his appeal. On September 20, 1991, the Petitioner's motion for a reduction of sentence pursuant to Federal Rule of Criminal Procedure 35(b) was denied. The Petitioner then

filed his first motion to vacate, set aside, or correct sentence under § 2255 in September of 1994. On March 20, 1995, the Petitioner's motion was denied. That denial was affirmed by the Third Circuit on January 5, 1996 and the Supreme Court denied the Petitioner's petition for a writ of certiorari on June 3, 1996. Subsequently, the Petitioner filed another motion for a reduction of sentence pursuant to Rule 35(b). The motion was denied on October 28, 1996 based upon a lack of jurisdiction and that decision was affirmed on appeal.

On June 15, 2000, the Petitioner filed a motion to vacate, set aside, or correct sentence under § 2255. This Court denied his motion on August 8, 2001, and also denied Petitioner a certificate of appealability. Petitioner now brings the instant motion before this Court seeking a reconsideration of the Court's refusal to issue a certificate of appealability.

II. LEGAL STANDARD

A. Motion for Reconsideration

"The standards controlling a motion for reconsideration are set forth in Federal Rule of Civil Procedure 59(e) and Local Rule of Civil Procedure 7.1." Vaidya v. Xerox Corp., No. Civ. A. 97-547, 1997 WL 732464, at *1 (E.D. Pa. Nov. 25, 1997). The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence. Max's Seafood Café by Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir.

1999)(citing North River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir.1995)). Therefore, a court should grant a motion for reconsideration only "if the moving party establishes one of three grounds: (1) there is newly available evidence; (2) an intervening change in the controlling law; or (3) there is a need to correct a clear error of law or prevent manifest injustice." Drake v. Steamfitters Local Union No. 420, No. Civ. A. 97-585, 1998 WL 564886, at *3 (E.D. Pa. Sept. 3, 1998) (citing Smith v. City of Chester, 155 F.R.D. 95, 96-97 (E.D. Pa. 1994)).

"Because federal courts have a strong interest in the finality of judgments, motions for reconsideration should be granted sparingly." Continental Casualty Co. v. Diversified Indus., Inc., 884 F.Supp. 937, 943 (E.D. Pa. 1995). Furthermore, "a motion for reconsideration is not properly grounded on a request that a court rethink a decision it has already made." Tobin v. Gen. Elec. Co., Civ. A. No. 95-4003, 1998 WL 31875, at *1 (E.D. Pa. Jan. 27, 1998); Glendon Energy Co. v. Borough of Glendon, 836 F.Supp. 1109, 1122 (E.D. Pa. 1993).

III. DISCUSSION

Here, Petitioner asks the Court to reconsider its August 8, 2001 Order declining to issue Petitioner a certificate of appealability. Petitioner does not allege that there has been an intervening change in the controlling law, or that new evidence is available. Petitioner fails to raise any new issue in the instant

motion that the Court did not already consider in issuing its August 8, 2001 Order. There being no intervening change in controlling law or newly available evidence, in the absence of a need to correct a clear error or prevent manifest injustice, Petitioner is merely "requesting the court to 'rethink' a decision it has already made." Glendon Energy, 836 F.Supp. at 1122. Nevertheless, the Court will once again reiterate its decision on the merits of Petitioner's claim.

A. Certificate of Appealability

In order to be entitled to a certificate of appealability, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To meet this standard, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484-85, 120 S.Ct. 1595, 1603-04, 146 L.Ed.2d 542, 555 (2000) ("To obtain a [certificate of appealability] . . . , a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that . . . includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" (citation omitted). In denying Petitioner in the instant matter the certificate of

appealability, the Court found that Petitioner failed to meet this threshold requirement. See U.S. v. Martorano, Crim. A. No. 83-314, Civ. A. No. 00-3040, 2001 WL 910799, at *6 (E.D. Pa. Aug. 8, 2001). Petitioner, again, fails to provide this Court with a substantial showing that he has been denied a constitutional right.

Petitioner now claims there are two "substantial issues" that warrant the issuance of a certificate of appealability. First, based on Mitchell v. U.S., 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999), Petitioner contends "[i]t is surely a 'substantial' issue as to whether, under the circumstances present here, where [Petitioner] was never addressed directly at his sentencing hearing, he should be required to interject the assertion of his privileges spontaneously." Mot. for Recons. at 3. Second, according to Petitioner, "[a] related substantial issue is presented by the Court's conclusion that a federal court has a right to increase a criminal defendant's sentence because the defendant has not 'cooperated' with the government." Id.

In the August 8, 2001 Order, this Court found that the holding of Mitchell v. U.S., 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999)¹ did not implicate the facts of the Petitioner's case. In Mitchell, the Supreme Court explained that "in determining facts

¹ For a complete discussion of Mitchell and its holding as it applies to the facts of the instant case, see this Court's Memorandum and Order in U.S. v. Martorano, Crim. A. No. 83-314, Civ. A. No. 00-3040, 2001 WL 910799 (E.D. Pa. Aug. 8, 2001).

about the crime which bear upon the severity of the sentence," the sentencing court "may not draw the adverse inference" from the defendant's silence. 526 U.S. at 316-17. The Supreme Court limited the restriction to factual inferences and declined to decide "[w]hether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided in [the sentencing guidelines]." Id. at 330. Therefore, the Supreme Court plainly stated that the issue Petitioner brought before this Court "is not before us, and we express no view on it." Id.

In the instant case, the sentencing court used Petitioner's silence as evidence of lack of contrition. Martorano, 2001 WL 910799, at *5 n.3. It did not draw a factual inference from Petitioner's silence. Moreover, "[w]hile the holding of Mitchell implicates the scope of the Fifth Amendment privilege, the Petitioner never asserted his Fifth Amendment right in the instant case." Martorano, 2001 WL 910799, at *3. In reviewing Petitioner's direct appeal from sentencing, the Third Circuit held that "Martorano did not invoke his Fifth Amendment right in any way in electing not to cooperate [and t]he district court was therefore at liberty to consider Martotano's failure to cooperate as evidence of a lack of contrition in imposing sentence." U.S. v. Martorano, 866 F.2d 62, 71 n.8 (3d Cir. 1989), cert. denied, 493 U.S. 1077, 110 S.Ct. 1128, 107 L.Ed.2d 1034 (1990).

This Court's conclusion that Mitchell is inapplicable to the facts of the case at bar is further supported by United States v. Constantine, Civ. A. No. 00-2115, 2001 WL 909010 (10th Cir. Aug. 13, 2001). In Constantine, the Tenth Circuit held that the sentencing court's denial of a requested downward departure based on the defendant's failure to carry his burden of proof as a consequence of his silence at sentencing was not a violation of the defendant's Fifth Amendment right to remain silent under Mitchell. Id. at *5. Accordingly, Mitchell does not constitute a new rule of constitutional law that is applicable to the facts of Petitioner's case.

IV. CONCLUSION

Petitioner has not come forward with any newly discovered evidence, does not cite an intervening change in controlling law and fails to point out any clear error of law or manifest injustice. Petitioner merely seeks to present identical arguments and issues that the Court has already fully considered. For the foregoing reasons, the Court again finds that Petitioner has not made a substantial showing of the denial of a constitutional right. Therefore, a certificate of appealability will not issue, and Petitioner's motion for reconsideration is denied.

An appropriate Order follows.

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O R D E R

AND NOW, this 11th day of December, 2001, upon consideration of the Petitioner George Martorano's Request for Reconsideration of a Portion of the August 8, 2001 Order (Docket No. 206), and the Government's Memorandum in Opposition to the Petitioner's Reconsideration of a Portion of the August 8, 2001 Order (Docket No. 207), IT IS HEREBY ORDERED that the Petitioner's Request for Reconsideration of a Portion of the August 8, 2001 Order is **DENIED**.

BY THE COURT:

HERBERT J. HUTTON, J.